

**SUBJECT:** Curtailing the scope of legal representation by the Attorney General

**COMMITTEE:** State Affairs — favorable, without amendment

**VOTE:** 12 ayes — Seidlits, Black, Danburg, Denton, Eckels, Erickson, Goodman, Jones, Marchant, Saunders, Tallas, Wolens

0 nays

3 absent — T. Hunter, S. Turner, Wilson

**SENATE VOTE:** On final passage, April 19 — 29-0

**WITNESSES:** None

**BACKGROUND:** Art. 4, sec. 22, of the Texas Constitution provides that the attorney general shall represent the state in all cases before the Texas Supreme Court to which the state is a party. Under Government Code sec. 402.021, the attorney general is empowered to prosecute and defend before the Texas Supreme Court and the courts of appeal all actions in which the state is interested. The Office of the Attorney General (OAG) also defends employees, members and other officers of state agencies, institutions or department in certain civil liability actions.

During the first special session in 1991, the OAG was charged with consolidating within its office most legal services for executive branch agencies, under Article 5 of SB 5, Montford et al. (72nd Legislature, first called session). Article 5 exempted from consolidation almost two dozen state agencies and organizational entities, ranging from the Governor's Office and other agencies directed by elected or appointed officials to the departments of public safety, parks and wildlife and insurance. The consolidation was to have been effected by September 1, 1992.

Under SB 118 by Henderson, enacted this session and signed by the governor, the State Securities Board will be added to list of exempted agencies, effective September 1, 1993. The House also has voted to exempt from the consolidation requirement the Texas Department of Banking (HB 1773 by Grusendorf) and the Texas School for the Deaf and

the Texas School for the Blind and Visually Impaired (HB 1501 by Naishtat).

**DIGEST:** SB 877 would amend the Government Code to repeal the Article 5 consolidation mandate, effective September 1, 1993.

The bill also would provide the Legislature with the right to select its own legal representation before all courts except for the Texas Supreme Court, effective immediately if the bill is finally approved by two-thirds of the members of each house.

The Legislature could employ counsel, or authorize the counsel of a legislative agency, to file suits or intervene on its behalf or otherwise represent it before state or federal courts, other than the Texas Supreme Court. In order to be authorized, legal representation would have to be approved, in writing, by the speaker of the House and the president of the Senate or by both houses by concurrent resolution.

**SUPPORTERS SAY:** SB 877 would restore to state agencies the authority to retain their own in-house counsel in order to address their special legal needs. Consolidation was an idea worth trying out, but all the evidence has shown it not to be effective for agencies that deal with technical issues requiring specialized expertise. The OAG has come up with a consolidation plan that few agencies have accepted.

The consolidation plan was enacted for the express purpose of saving money, but some cost-cutting ideas just fail to work out. It would be better to repeal the provision outright than to create special exceptions piecemeal for virtually every agency that would still be affected by the consolidation plan.

SB 877 also would give the Legislature the option of hiring its own counsel when circumstances warranted, as when urgent issues require immediate attention or when a matter poses a conflict of interest between the Legislature and the attorney general. The bill is grounded on strong constitutional footing: in exercising its prerogatives permitted under the constitutional separation of powers, the Legislature specifically would leave

undisturbed the OAG's authority to represent the state before the Texas Supreme Court.

Art. 2, sec. 1, of the Texas Constitution clearly mandates the separation of government powers. As an executive branch agency, the OAG may have a different agenda, set of priorities or legal strategy for tackling issues before the courts than the legislative branch of government. These differences have been illustrated in recent years with the mental health/mental retardation, prison and redistricting issues.

SB 877 is not intended as criticism of the performance of any attorney general, past or present. It merely reflects the fact that in major cases involving years of litigation, attorneys general may be locked into a particular position or strategy that differs from that of a majority of the members of the Legislature or the legislative leadership. With outside counsel or legal staff from legislative agencies such as the Legislative Council, the Legislature could take positions and raise issues no longer open to the OAG. Since ultimate responsibility for finding the money to pay for any remedies ordered by the federal courts rests with the Legislature, it should at least have the chance to have its say in court.

Under SB 877, the OAG would still be the official attorney for the state and would continue to represent the Legislature in most situations. But the Legislature should have the option in certain cases of using its own counsel to ensure that its special concerns are heard. Having more than one voice at the courthouse would not weaken the state's position; the courts are more than capable of sorting out the various positions presented and would benefit from hearing a diversity of views.

In cases involving the Legislative Redistricting Board, the attorney general serves as a member, along with the speaker of the House, the lieutenant governor, the comptroller and the land commissioner. The legislative leadership may have taken a position on a redistricting plan different from that of the attorney general, who would have a clear conflict of interest defending a plan he or she is on record as opposing.

Allowing the speaker and the lieutenant governor to approve legal representation merely would be a vehicle to provide for separate counsel when the Legislature was not in session.

OPPONENTS  
SAY:

SB 877 would increase the fragmentation of state legal services and drive up costs to the taxpayers. Upending the consolidation plan would be giving in to agencies that want their own in-house set of lawyers regardless of the economic justification. The OAG's plan for consolidating state legal services has not been given a fair chance to work — motivated by the hope of legislative exemption, most agencies have refused to cooperate.

Under the OAG plan, current staff attorneys would remain on-site, providing their usual services while gradually assuming responsibility for representing their client in specialized areas, including administrative appeals, rulemaking challenges and declaratory judgment actions in district and appellate courts. Regulatory agencies would be ensured direct access to legal counsel with required expertise. Repealing the consolidation plan means maintaining duplicative — and costly — legal libraries and computerized legal services. Furthermore, an overly decentralized system makes it difficult for the state to ensure a consistent legal position.

Problems would inevitably arise if the Legislature were to appropriate the power to hire its own outside counsel. Taxpayers do not need to foot the bill for hiring high-priced lawyers for the Legislature to muddy the legal waters when the state should be taking a consistent legal position. The Legislative Council legal staff is intended to provide objective counsel on statutory interpretation and bill drafting, not to act as a corps of litigators.

Allowing the speaker and the lieutenant governor to hire outside counsel might be a means of ensuring quick action when the Legislature is not in session, although nothing in the bill would restrict this authority to the interims between sessions. Furthermore, there is no guarantee that most members of the Legislature would necessarily hold the same position on any issue before the courts. The attorney general, however, has a constitutional mandate to represent the best interests of the state and is directly accountable to the voters for his or her actions. Texas needs to ensure that the OAG continues as an impartial representative for the state in the face of competing political interests.

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NOTES:

Similar bills concerning separate legal representation for the Legislature passed the House in 1987 (HB 2331 by C. Harris) and in 1989 (HB 1923 by Hury) and the Senate in 1991 (SB 874 by Haley) but died in the other house.